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6 **UNITED STATES DISTRICT COURT**
7 **EASTERN DISTRICT OF WASHINGTON**

8 ERIC CHRISTOPHER MCCULLOUGH,

9 Plaintiff,

10 vs.

11 COMMISSIONER OF SOCIAL SECURITY,

12 Defendant.

No. 1:16-cv-03097-MKD

ORDER DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

ECF Nos. 15, 19

14 BEFORE THE COURT are the parties' cross-motions for summary
15 judgment. ECF Nos. 15, 19. The parties consented to proceed before a magistrate
16 judge. ECF No. 7. The Court, having reviewed the administrative record and the
17 parties' briefing, is fully informed. For the reasons discussed below, the Court
18 denies Plaintiff's motion (ECF No. 15) and grants Defendant's motion (ECF No.
19 19).

20
- - ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 1

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

STANDARD OF REVIEW

A district court’s review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner’s decision will be disturbed “only if it is not supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an

1 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless
2 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
3 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's
4 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
5 *Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered "disabled" within
8 the meaning of the Social Security Act. *See* 42 U.S.C. § 1382c. First, the claimant
9 must be "unable to engage in any substantial gainful activity by reason of any
10 medically determinable physical or mental impairment which can be expected to
11 result in death or which has lasted or can be expected to last for a continuous
12 period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). Second, the
13 claimant's impairment must be "of such severity that he is not only unable to do
14 his previous work[,] but cannot, considering his age, education, and work
15 experience, engage in any other kind of substantial gainful work which exists in
16 the national economy...." 42 U.S.C. § 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
19 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work
20 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial

1 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
2 C.F.R. § 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
6 “any impairment or combination of impairments which significantly limits [his or
7 her] physical or mental ability to do basic work activities,” the analysis proceeds to
8 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
9 this severity threshold, however, the Commissioner must find that the claimant is
10 not disabled. *Id.*

11 At step three, the Commissioner compares the claimant’s impairment to
12 severe impairments recognized by the Commissioner to be so severe as to preclude
13 a person from engaging in substantial gainful activity. 20 C.F.R. §
14 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
15 enumerated impairments, the Commissioner must find the claimant disabled and
16 award benefits. 20 C.F.R. § 416.920(d).

17 If the severity of the claimant’s impairment does not meet or exceed the
18 severity of the enumerated impairments, the Commissioner must pause to assess
19 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
20 defined generally as the claimant’s ability to perform physical and mental work

activities on a sustained basis despite his or her limitations, 20 C.F.R. § 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy. 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education and past work experience. *Id.* If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. *Id.*

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is

1 capable of performing other work; and (2) such work “exists in significant
2 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
3 700 F.3d 386, 389 (9th Cir. 2012).

4 **ALJ’s FINDINGS**

5 Plaintiff protectively applied for Title XVI supplemental security income
6 benefits on December 12, 2011, alleging an onset disability date of January 14,
7 2010. Tr. 174-81. The application was denied initially, Tr. 97-100, and on
8 reconsideration, Tr. 105-13. Plaintiff appeared at a hearing before an
9 administrative law judge (ALJ) on October 30, 2014. Tr. 30-69. On February 17,
10 2015, the ALJ denied Plaintiff’s claim. Tr. 13-24.

11 At step one of the sequential evaluation analysis, the ALJ found Plaintiff has
12 not engaged in substantial gainful activity since December 12, 2011, the
13 application date. Tr. 15. At step two, the ALJ found Plaintiff has the following
14 severe impairments: depressive disorder; cannabis abuse; post traumatic stress
15 disorder; and attention deficit hyperactivity disorder. Tr. 15. At step three, the
16 ALJ found Plaintiff does not have an impairment or combination of impairments
17 that meets or medically equals the severity of a listed impairment. Tr. 17. The
18 ALJ then concluded that Plaintiff has the RFC to perform a full range of all
19 exertional levels of work with the following nonexertional limitations:
20

1 unskilled repetitive routine work, no contact with the public,
2 occasional contact with supervisors and co-workers, off task at work
3 10% of the time but still able to meet minimum production
4 requirements, and absent from work one time per month.

5 Tr. 18.

6 At step four, the ALJ found Plaintiff is unable to perform any past relevant
7 work. Tr. 22. At step five, after considering the testimony of a vocational expert,
8 the ALJ found there are jobs that exist in significant numbers in the national
9 economy that Plaintiff can perform, such as hand packager and laundry worker.

10 Tr. 23-24. Thus, the ALJ concluded Plaintiff has not been under a disability since
11 December 12, 2011, the application date. Tr. 24.

12 On April 7, 2016, the Appeals Council denied review of the ALJ's decision,
13 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
14 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

15 **ISSUES**

16 Plaintiff seeks judicial review of the Commissioner's final decision denying
17 him supplemental security income benefits under Title XVI of the Social Security
18 Act. Plaintiff raises the following issues for review:

- 19 1. Whether the ALJ properly identified all of Plaintiff's severe
20 impairments at step two;

1 2. Whether the ALJ properly evaluated the medical opinion evidence;
2 and

3 3. Whether the ALJ's step five determination is supported by substantial
4 evidence.

5 ECF No. 15 at 4.

6 **DISCUSSION**

7 **A. Severe Impairments**

8 Plaintiff contends that the ALJ improperly failed to identify Plaintiff's
9 neurological impairments, specifically movement disorder, as a severe impairment
10 at step two. ECF No. 15 at 7-8.

11 At step two of the sequential process, the ALJ must determine whether
12 claimant suffers from a "severe" impairment, i.e., one that significantly limits his
13 physical or mental ability to do basic work activities. 20 C.F.R. § 416.920(c). To
14 show a severe impairment, the claimant must first prove the existence of a physical
15 or mental impairment by providing medical evidence consisting of signs,
16 symptoms, and laboratory findings; the claimant's own statement of symptoms
17 alone will not suffice. 20 C.F.R. § 416.908 (2016).¹

18
19 ¹ As of March 27, 2017, 20 C.F.R. § 416.908 was removed and reserved and 20
20 C.F.R. § 416.921 was revised to state the following:

1 An impairment may be found to be not severe when “medical evidence
2 establishes only a slight abnormality or a combination of slight abnormalities
3 which would have no more than a minimal effect on an individual’s ability to
4 work....” S.S.R. 85-28 at *3. Similarly, an impairment is not severe if it does not
5 significantly limit a claimant’s physical or mental ability to do basic work
6 activities; which include walking, standing, sitting, lifting, pushing, pulling,
7 reaching, carrying, or handling; seeing, hearing, and speaking; understanding,
8 carrying out and remembering simple instructions; responding appropriately to
9 supervision, coworkers and usual work situations; and dealing with changes in a
10 routine work setting. 20 C.F.R. § 416.921(a) (2016);² S.S.R. 85-28.

11 Your impairment(s) must result from anatomical, physiological, or
12 psychological abnormalities that can be shown by medically acceptable
13 clinical and laboratory diagnostic techniques. Therefore, a physical or
14 mental impairment must be established by objective medical evidence from
15 an acceptable medical source. We will not use your statement of symptoms,
a diagnosis, or a medical opinion to establish the existence of an
impairment(s). After we establish that you have a medically determinable
impairment(s), then we determine whether your impairment(s) is severe.

16 ² The Supreme Court upheld the validity of the Commissioner’s severity
17 regulation, as clarified in S.S.R. 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-54
18 (1987).

19 As of March 27, 2017, 20 C.F.R. §§ 416.921 and 416.922 were amended.

20 Section 416.922(a) was revised to state the following:

ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT - 9

1 The ALJ found that Plaintiff had the following severe impairments:
2 depressive disorder, cannabis abuse, post traumatic stress disorder, and attention
3 deficit hyperactivity disorder. Tr. 15. The ALJ found that Plaintiff has
4 “complained of ‘multiple neurologic symptoms’ commonly referred to as a
5 ‘movement disorder,’ but [the ALJ did] not find that the record establishes a severe
6 physical impairment.” Tr. 15.

7 First, the ALJ concluded that “the record is absent any objective medical
8 signs and laboratory findings to establish a severe impairment based on these
9 complaints.” Tr. 16. As noted by the ALJ, Dr. Gilmore examined Plaintiff in June
10 2012, which resulted in normal findings. Tr. 16 (citing Tr. 291-93). For example,
11 the exam showed no arm drift, his strength and fine movements were normal in the

12 (a) Non-severe impairment(s). An impairment or combination of
13 impairments is not severe if it does not significantly limit your physical or
14 mental ability to do basic work activities.

15 (b) Basic work activities. When we talk about basic work activities, we
16 mean the abilities and aptitudes necessary to do most jobs. Examples of
17 these include—

18 (1) Physical functions such as walking, standing, sitting, lifting, pushing,
19 pulling, reaching, carrying, or handling;

20 (2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, co-workers and usual work
situations; and

(6) Dealing with changes in a routine work setting.

1 upper extremities. Tr. 16 (citing Tr. 292). Dr. Gilmore noted Plaintiff's
2 allegations of "multiple neurological symptoms," but concluded that the "objective
3 portions of the neurological exam are normal." Tr. 292. The ALJ further noted an
4 April 2014 examination by his primary care physician, Dr. Crank, showed normal
5 results. Tr. 16 (citing Tr. 388 ("during exam no jerks, overall fairly [normal] exam
6 with no [facial] neuro defects")). Similarly, the ALJ noted that Dr. Holmes, a
7 neurologist, examined Plaintiff in September 2014, which exam resulted in normal
8 findings. Tr. 16 (citing Tr. 427). Based on these findings the ALJ concluded that
9 "no clinician has established any objective medical signs or a definitive diagnosis."
10 Tr. 16.

11 Plaintiff challenges this finding, contending that Dr. Crank diagnosed
12 Plaintiff with "movement disorder," which was supported by Dr. Crank's notes
13 indicating he "observed jerks to the right side while [Plaintiff] was in the clinic,"
14 and "he was unable to heel walk and had a tremor located in the right and left
15 hands." ECF No. 15 at 7-8. In fact, as the ALJ noted, the record does not reflect
16 that a firm diagnosis was made by Dr. Clark. In October 2014, Dr. Crank noted
17 that Plaintiff "is being worked up for seizures [versus] seizure like diagnosis with
18 upcoming video monitoring/EEG with neurologist." Tr. 430. Dr. Crank further
19 noted that there was no current treatment plan because he did not have a clear
20 diagnosis and Dr. Crank could not determine whether work would cause Plaintiff's

1 condition to deteriorate until there was a “firm diagnosis.” Tr. 432. Moreover, in
2 the report cited by Plaintiff, Dr. Crank noted that Plaintiff had not yet completed
3 the follow up appointments necessary to get a clear diagnosis of movement
4 disorder and stated that Dr. Crank would “place urgent referral to neurology at U
5 of Washington for dx clarification.” Tr. 386. Accordingly, the ALJ reasonably
6 concluded that Plaintiff was not diagnosed with movement disorder and that an
7 impairment was not established by objective medical signs and laboratory findings.

8 Second, although a severe impairment cannot be established by symptom
9 complaints alone, the ALJ found that Plaintiff lacked credibility regarding his
10 symptoms claims related to neurological impairments. Tr. 15-16. The ALJ noted
11 that although Plaintiff claimed the symptoms began after a bad reaction to
12 Wellbutrin, Plaintiff did not mention such dramatic symptoms when he took the
13 medication or shortly thereafter. Tr. 15. Plaintiff was prescribed the medication in
14 August 2011; at his next appointment in September, the notes simply indicate he
15 “did not tolerate the medication.” Tr. 16 (citing Tr. 284). The record reflects that
16 Plaintiff did not present with complaints related to the side effects until June 2012,
17 approximately nine months after he stopped taking the medication. Tr. 16 (citing
18 Tr. 425). The ALJ noted that Plaintiff presented in the emergency room in the
19 interim with a purported anxiety attack and did not mention the neurological
20 episodes. Tr. 16 (citing Tr. 279-80). Moreover, the ALJ further noted that

1 Plaintiff presented at a medical provider in June 2012 requesting a note stating that
2 he cannot work. Tr. 16 (citing Tr. 393). After a June 2012 evaluation by Dr.
3 Gilmore, Dr. Gilmore ordered laboratory testing and Plaintiff failed to follow up
4 with Dr. Gilmore. Tr. 16 (citing Tr. 291-93). Plaintiff did not seek treatment again
5 until April of 2014. Tr. 16 (citing Tr. 390). The ALJ reasonably found that such a
6 gap in the reporting and treatment undermines Plaintiff's credibility, particularly
7 given the significant nature of the allegations. Tr. 16.

8 Furthermore, even if the ALJ should have determined that movement
9 disorder is a severe impairment, any error would be harmless because the step was
10 resolved in Plaintiff's favor. *See Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d
11 1050, 1055 (9th Cir. 2006); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005).
12 Plaintiff makes no showing that the condition mentioned creates limitations not
13 already accounted for in the RFC and or otherwise properly rejected by the ALJ.³
14 *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir.
15 2008) (determining issue not argued with specificity may not be considered by the
16 Court). Thus, the ALJ's step two finding is legally sufficient.

17 _____
18 ³ Plaintiff contends that Plaintiff was unable to heel walk and had hand tremors.
19 ECF No. 15 at 7-8. However, Plaintiff has made no effort to identify any
20 limitation this poses on his work functioning.

1 **B. Medical Opinion Evidence**

2 Next, Plaintiff faults the ALJ for discounting the treating medical opinions
3 of Jeramiah Crank, M.D., and Shane Anderson, Pharm. D. ECF No. 15 at 8-11.

4 There are three types of physicians: “(1) those who treat the claimant
5 (treating physicians); (2) those who examine but do not treat the claimant
6 (examining physicians); and (3) those who neither examine nor treat the claimant
7 [but who review the claimant's file] (nonexamining [or reviewing] physicians).”
8 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
9 Generally, a treating physician’s opinion carries more weight than an examining
10 physician’s, and an examining physician’s opinion carries more weight than a
11 reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more weight
12 to opinions that are explained than to those that are not, and to the opinions of
13 specialists concerning matters relating to their specialty over that of
14 nonspecialists.” *Id.* (citations omitted).

15 If a treating or examining physician’s opinion is uncontradicted, the ALJ
16 may reject it only by offering “clear and convincing reasons that are supported by
17 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
18 “However, the ALJ need not accept the opinion of any physician, including a
19 treating physician, if that opinion is brief, conclusory and inadequately supported
20 by clinical findings.” *Bray v. Comm’r of Soc. Security*, 554 F.3d 1219, 1228 (9th

1 Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
2 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
3 may only reject it by providing specific and legitimate reasons that are supported
4 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
5 F.3d 821, 830-31 (9th Cir. 1995)).

6 The opinion of an acceptable medical source, such as a physician or
7 psychologist, is given more weight than that of an “other source.” 20 C.F.R.
8 § 416.927 (2016); *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996). “Other
9 sources” include nurse practitioners, physicians’ assistants, therapists, teachers,
10 social workers, spouses and other non-medical sources. 20 C.F.R. § 416.913(d)
11 (2016). However, the ALJ is required to “consider observations by non-medical
12 sources as to how an impairment affects a claimant’s ability to work.” *Sprague v.*
13 *Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). Non-medical testimony can never
14 establish a diagnosis or disability absent corroborating competent medical
15 evidence. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). Pursuant to
16 *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993), an ALJ is obligated to give
17 reasons germane to “other source” testimony before discounting it.

18 *1. Dr. Crank*

19 Dr. Crank, Plaintiff’s primary care physician, completed a medical report on
20 October 29, 2014. Tr. 429-32. Dr. Crank opined that Plaintiff would miss four

1 days or more of work a month due to seizure activity. Tr. 430, 432. The ALJ
2 rejected Dr. Crank's opinion. Tr. 16. Because Dr. Crank's opinion was
3 contradicted by Dr. Toews, Tr. 294-98, the ALJ was required to provide specific
4 and legitimate reasons for rejecting the opinion. *Bayliss*, 427 F.3d at 1216.

5 First, the ALJ rejected Dr. Crank's limitation because he offered no
6 objective evidence to support such limitation. Tr. 16. The ALJ further noted that
7 Dr. Crank did not offer a diagnosis, but referred instead to Plaintiff's anticipated
8 neurological work-up. Tr. 16-17. Factors relevant to evaluating any medical
9 opinion include the amount of relevant evidence that supports the opinion, the
10 quality of the explanation provided in the opinion, and the consistency of the
11 medical opinion with the record as a whole. 20 C.F.R. § 416.927(c); *Lingenfelter*
12 *v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631
13 (9th Cir. 2007). Here, the ALJ correctly noted that Dr. Crank did not identify or
14 provide any medical evidence to support his assertions. Tr. 16. In fact, Dr. Crank
15 specifically noted that no firm diagnosis, treatment, or prognosis could be given
16 until Plaintiff underwent testing, including an EEG and MRI. Tr. 431. Plaintiff
17 counters that Dr. Crank observed jerking on Plaintiff's right side while he was in
18 the clinic. ECF No. 15 at 10 (citing Tr. 388). Such observation is insufficient to
19 support the extreme limitation set forth in the opinion. The lack of objective
20

1 medical evidence supporting the limitation is was a specific and legitimate reason
2 to reject Dr. Crank's opinion.

3 Next, the ALJ rejected Dr. Crank's limitation because the limitation was
4 based on Plaintiff's discredited subjective reports. Tr. 16. A physician's opinion
5 may be rejected if it is based on a claimant's subjective complaints which were
6 properly discounted. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001);
7 *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999); *Fair v.*
8 *Bowen*, 885 F.2d 597, 604 (9th Cir. 1989). Here, Plaintiff did not challenge the
9 ALJ's finding that some of Plaintiff's "statements concerning the intensity,
10 persistence and limiting effect of these symptoms are not entirely credible...." Tr.
11 19; *see* ECF No. 15. Any challenge to that finding is waived. *Campbell v. Burt*,
12 141 F.3d 927, 931 (9th Cir. 1998) (holding that issues not raised before the district
13 court are waived on appeal); *Hughes v. Astrue*, 357 F. App'x 864, 866 (9th Cir.
14 2009) (unpublished) (holding failure to challenge the ALJ's credibility finding in
15 the district court waives any challenge to that finding on appeal).

16 Instead, Plaintiff contends that the ALJ failed to explain how he reached the
17 conclusion that the opinion was based on Plaintiff's subjective complaints. ECF
18 No. 15 at 10. Here, the ALJ noted that Dr. Crank offered no objective evidence to
19 support the limitation, did not have a diagnosis, and was waiting for Plaintiff's
20 future neurological work-up. Tr. 16-17. There is no documentation in the medical

1 record regarding the number of seizures Plaintiff suffered a month other than
2 Plaintiff's self-report. The ALJ's conclusion that Dr. Crank relied on Plaintiff's
3 self-reported symptom testimony is reasonable given the lack of medical evidence.
4 Reliance on a Plaintiff's discredited symptom testimony is a specific and legitimate
5 reason for the ALJ to discount Dr. Crank's opinion.

6 2. *Mr. Anderson*

7 Mr. Anderson completed a DSHS Documentation Request for Medical or
8 Disability Condition on October 14, 2013. Tr. 319-21. Mr. Anderson's report
9 indicated that Plaintiff suffers from depression and PTSD. Tr. 319. Mr.
10 Anderson's check form indicated that these conditions cause limitations on
11 Plaintiff's ability to concentrate for extended periods of time, interact with people,
12 use transportation, and follow a written employability plan. Tr. 319. In the section
13 requesting that the provider explain any specific limitations, Mr. Anderson
14 declined to provide an explanation. Tr. 319. Mr. Anderson opined that Plaintiff
15 should be limited to working only one to ten hours per week and further opined
16 that these limitations were not permanent, in that they should last three to six
17 months. Tr. 319-20. The ALJ gave minimal weight to the opinion. Tr. 22.
18 Because he has a doctorate in pharmacy, Mr. Anderson is not an acceptable
19 medical source under the regulations. 20 C.F.R. § 416.927(a)-(f). Thus, the ALJ

1 was required to cite germane reasons for rejecting the opinion. *See Dodrill*, 12
2 F.3d at 919.

3 First, the ALJ rejected Mr. Anderson's opinion because as Plaintiff's
4 medication manager, Mr. Anderson performed no testing, cognitive or otherwise,
5 on Plaintiff. Tr. 22. Moreover, in the form, Mr. Anderson cited no objective
6 evidence to support these limitations and noted that no such evidence appeared in
7 Mr. Anderson's clinical notes. Tr. 22. As noted *supra*, factors relevant to
8 evaluating any medical opinion include the amount of relevant evidence that
9 supports the opinion, the quality of the explanation provided in the opinion, and the
10 consistency of the medical opinion with the record as a whole. 20 C.F.R. §
11 416.927(c); *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631. A medical
12 opinion may be rejected by the ALJ if it contains inconsistencies or is unsupported.
13 *Bray*, 554 F.3d at 1228. As the ALJ noted, Mr. Anderson performed no testing and
14 his clinical notes do not support the degree of limitations he assessed. This was a
15 germane reason to reject his opinion.

16 Second, the ALJ rejected Mr. Anderson's opinion because it was
17 inconsistent with the mental status examination performed by Dr. Toews. Tr. 22.
18 The consistency of a medical opinion with the record as a whole is a relevant factor
19 in evaluating a medical opinion. *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at
20 631. The ALJ referenced the findings of Dr. Toews, a psychologist who conducted

1 a clinical interview, mental status examination, reviewed the medical record and
2 conducted a SIMS test, and opined that Plaintiff was capable of remembering
3 detailed instructions and performing repetitive types of jobs. Tr. 22. The ALJ
4 correctly noted that Plaintiff performed well on the mental status exam. Tr. 22
5 (citing Tr. 297-98). It is the role of the ALJ to resolve conflicts and ambiguity in
6 the evidence. *See Morgan*, 169 F.3d at 599-600; *see also Sprague*, 812 F.2d at
7 1229-30. The ALJ reasonably relied on Dr. Toews' findings over Mr. Anderson's
8 findings, particularly because Dr. Toews' findings are based on objective test
9 results. This was a germane reason to reject the assessed limitations.

10 Third, the ALJ rejected Mr. Anderson's assessed limitations because they
11 were based on the claimant's subjective reports. A physician's opinion may be
12 rejected if it is based on a claimant's subjective complaints which were properly
13 discounted. *Tonapetyan*, 242 F.3d at 1149; *Morgan*, 169 F.3d at 602; *Fair*, 885
14 F.2d at 604. As noted *supra*, Plaintiff did not challenge the ALJ's credibility
15 determination. Given the lack of testing, the lack of medical evidence cited, and
16 the lack of supporting clinical notes, the ALJ reasonably concluded that Mr.
17 Anderson's severe assessed limitations were based on Plaintiff's discredited self-
18 report. This was another germane reason to reject Mr. Anderson's assessed
19 limitations.

20 C. Step Five Finding

1 Plaintiff contends the ALJ's step five finding regarding Plaintiff's ability to
2 perform work is not supported by substantial evidence because the testimony from
3 the vocational expert was based on an improper hypothetical. ECF No. 15 at 11-
4 12. The ALJ's hypothetical must be based on medical assumptions supported by
5 substantial evidence in the record that reflects all of the claimant's limitations.
6 *Osenbrock v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001). The hypothetical should
7 be "accurate, detailed, and supported by the medical record." *Tackett v. Apfel*, 180
8 F.3d 1094, 1101 (9th Cir. 1999). The ALJ is not bound to accept as true the
9 restrictions presented in a hypothetical question propounded by a claimant's
10 counsel. *Magallanes v. Bowen*, 881 F.2d 747, 756-57 (9th Cir. 1989); *Martinez v.*
11 *Heckler*, 807 F.2d 771, 773 (9th Cir. 1986). The ALJ is free to accept or reject
12 these restrictions as long as they are supported by substantial evidence, even when
13 there is conflicting medical evidence. *Martinez*, 807 F.2d at 773-74. Plaintiff's
14 argument assumes the ALJ erred in evaluating the medical evidence. ECF No. 15
15 at 11-12. For reasons discussed *supra*, the ALJ's hypothetical to the vocational
16 expert (VE) was based on the evidence and reasonably reflects Plaintiff's
17 limitations. Thus, the ALJ's findings are supported by substantial evidence and are
18 legally sufficient.

19 Finally, Plaintiff asserts that the ALJ's finding that Plaintiff can perform
20 work that exists in significant numbers in the national economy is not supported by

1 substantial evidence. ECF No. 15 at 12. The Ninth Circuit authority is deferential
2 “to an ALJ’s supported finding that a particular number of jobs in the claimant’s
3 region was significant.” *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 527-28
4 (9th Cir. 2014) (citing *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 690
5 (9th Cir. 2009) (holding that a reviewing court must uphold the ALJ’s decision if it
6 is supported by “substantial evidence,” which “is a highly deferential standard of
7 review.”)). The Ninth Circuit has never set a “bright-line rule for what constitutes
8 a ‘significant number’ of jobs.” *Gutierrez*, 740 F.3d at 528 (finding 2,500 in the
9 state of California significant and 25,000 nationally significant).

10 Here, the ALJ posed a hypothetical to the VE with Plaintiff’s profile, to
11 which the VE testified that there are at least two jobs that exist in the national
12 economy, which would be reduced by approximately 75% to 90% given the
13 specific limitations. Tr. 61-68. The resulting jobs and numbers that exist if
14 reduced by 90% are as follows: hand packager (DOT 559.687-074), for which
15 there are 480,000 jobs in the national economy, and 48,000 if reduced by 90%; and
16 laundry worker (DOT 361.685-018), for which there are 215,000 in the national
17 economy, and 21,500 if reduced by 90%.⁴ Citing no legal authority, Plaintiff

18 _____
19 ⁴ The VE testified that as to the job of hand packager, 7,000 jobs exist in
20 Washington state, Tr. 63, (700 if reduced by 90%), and as to the job of laundry

1 asserts the “jobs are so significantly eroded they do not exist in significant numbers
2 in the national economy.” ECF No. 15 at 12. Given the Ninth Circuit has
3 previously found 25,000 in the national economy significant, the Court finds no
4 error in the ALJ’s finding that these two jobs, which when combined total 69,500
5 jobs (even if reduced by 90%), to be significant work. *See Gutierrez*, 740 F.3d at
6 528 (finding 25,000 national jobs significant).

7 Plaintiff’s citation to *Eback v. Chater*, 94 F.3d 410 (8th Cir. 1996) is
8 unpersuasive. In *Eback*, the VE testified his finding that significant jobs existed in
9 the national economy relied on the assumption that employers would accommodate
10 claimant’s need to use a nebulizer under the Americans with Disabilities Act

11
12 worker, 3,000 exist in Washington state, Tr. 63, (300 if reduced by 90%). The
13 Court finds that 1,000 jobs in Washington constitutes significant work. *See, e.g.,*
14 *Thomas v. Barnhart*, 278 F.3d 947, 960 (9th Cir. 2002) (upholding the ALJ’s
15 finding that 1,300 jobs in Oregon constituted significant work) (cited with approval
16 in *Gutierrez*, 740 F.3d at 528); *Johnson v. Chater*, 108 F.3d 178, 180-81 (8th Cir.
17 1997) (upholding the ALJ’s finding that 200 jobs in Iowa constituted significant
18 work) (cited with approval in *Gutierrez*, 740 F.3d at 528); *Trimiar v. Sullivan*, 966
19 F.2d 1326, 1330-32 (10th Cir. 1992) (650 to 900 jobs in Oklahoma constituted
20 significant work) (cited with approval in *Gutierrez*, 740 F.3d at 528).

1 (ADA). *Eback*, 94 F.3d at 412. The Court found the ALJ's reasoning faulty for
2 several reasons, one of which was an assumption of ADA compliance. *Id.* Here,
3 the VE did not rely on the assumption of employer ADA compliance.

4 The ALJ's step five finding is supported by substantial evidence.

5 **CONCLUSION**

6 After review, the Court finds that the ALJ's decision is supported by
7 substantial evidence and free of harmful legal error.

8 **IT IS ORDERED:**

9 1. Plaintiff's motion for summary judgment (ECF No. 15) is **DENIED**.

10 2. Defendant's motion for summary judgment (ECF No. 19) is **GRANTED**.

11 The District Court Executive is directed to file this Order, enter
12 **JUDGMENT FOR THE DEFENDANT**, provide copies to counsel, and **CLOSE**
13 **THE FILE**.

14 DATED June 29, 2017.

15 s/Mary K. Dimke
16 MARY K. DIMKE
17 UNITED STATES MAGISTRATE JUDGE
18
19
20